STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2005-549

February 22, 2006

PUBLIC UTILITIES COMMISSION
Underground Facility Damage Prevention Requirements (Chapter 895) Pursuant to P.L. 2005, Chapter 334

ORDER PROVISIONALLY ADOPTING RULE

ADAMS, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this rulemaking, we provisionally adopt amendments to Chapter 895, the Underground Facility Damage Prevention Requirements Rule. The amendments carry out the directives in P.L. 2005, ch. 334, which provides for changes to four procedures associated with underground facility damage prevention in Maine. This is a major substantive rulemaking, and thus the Commission provisionally adopts the amendments, which will then be subject to review and adoption by the Legislature. 5 M.R.S.A. § 8071.[1]

The four areas addressed by the Act are, in summary:

- alternative notice requirement procedures for excavation;
- newly installed underground facilities in active excavation areas;
- penalties; and
- discovered facilities.

II. BACKGROUND

The law protecting underground facilities requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public when excavation occurs near an underground facility. 23 M.R.S.A. § 3360-A. The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. The Dig Safe System, Inc. (the System), a member-owned corporation that operates the New England regional damage prevention call center, currently runs the underground facility damage prevention system.

During the first session of the 122nd Legislature, Maine's Legislature enacted P.L. 2005, ch. 334 (the 2005 Act), consisting of four components. First, Section 1 of the

[1] A copy of the proposed rule and Notice of Rulemaking are available by accessing Online Documents and Services and then the Virtual Case File, on the Commission web page (www.state.me.us/mpuc). P.L. 2005 ch. 334 is available on the State of Maine web site (www.state.me.us/legis/ros/lom/LOM122nd/LOM122Directory.htm)

2005 Act authorizes the Commission to extend its rule establishing alternative notice requirements for excavation associated with drinking water well construction to other types of excavation. Section 1 of the 2005 Act also directs the Commission to establish, by rule, procedures to reduce the incidence of damage to newly installed underground facilities in active excavation areas and to define the term "active excavation area." The 2005 Act allows the Commission to adopt additional requirements for excavators or operators, including re-notification and marking requirements and system notification procedures.

Sections 2 and 5 of the 2005 Act direct the Commission to establish, by rule, standards for determining when and at what level penalties are assessed pursuant to the damage prevention statute. It requires that, before imposing any penalties pursuant to the statute, the Commission consider the record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months. It also directs the Commission to consider the seriousness of the violation and its impact on those served by the underground facility.

Finally, Section 3 of the 2005 Act authorizes the Commission to direct an operator to determine and map the location of its facility for a reasonable distance from the point of discovery, when an underground facility is discovered during an excavation and the location of that facility was, prior to the discovery, unknown or unclear to the operator.

On September 27, 2005, the Commission issued a Notice of Inquiry[2] to solicit information that would assist in implementing this directive. The Commission received written comments and held a technical conference on October 21, 2005.[3]

On November 15, 2006, the Commission opened the rulemaking to implement the terms of the 2005 Act. We held a public hearing on December 14, 2005. Notice of the rulemaking was sent to all excavators and operators that the Commission could locate in a systematic manner, including over 800 excavators and operators that have been involved in a damage prevention incident or damage prevention training. Interested persons provided pre-hearing and post-hearing written comments. AT&T,

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[2] Docket No. 2005-548, Underground Facility Damage Prevention Procedures Related to Newly Installed Facilities.

[3] AT&T, Central Maine Power Company, the Dig Safe System, Maine Natural Gas, Maine Rural Water Association, Maine Water Utilities Association, New England Cable and Telecommunications Association, Northern Utilities, On Target, Portland Water District, Telephone Association of Maine, and Verizon Maine submitted comments or participated in the technical conference. In addition, Commission Staff met informally with members of the Associated Constructors of Maine and with representatives of some member operators.

Central Maine Power Company (CMP), the Dig Safe System (the System), On Target, the Telephone Association of Maine (TAM), the Portland Water District (PWD), the Winthrop Utilities District, and Verizon Maine (Verizon) submitted written comments. Bangor Hydro-Electric Company (BHE), CMP, the DSS, On Target, Northern Utilities, TAM, Downeast Energy, Andrew Bowie Inc. Well Drilling, Weeks & Son Drilling, C&R Well Drilling, H2O Well Drilling, and Verizon attended the public hearing.

III. DISCUSSION OF AMENDMENTS

We discuss below the four components of the Act and the corresponding amendments we provisionally adopt.

A. Alternative notice requirement procedures for excavation

In September 2003, the Legislature enacted P.L. 2003, ch. 373, which required the Commission to establish, through major substantive rule, notice requirements for excavations associated with drinking water well construction.[4] In response, the Commission added Sections 2(H-1) and 4(B)(1)(a)(ii) to Chapter 895,[5] which state that an excavator engaged in such activity need not notify the Dig Safe System if the excavator discovers from a Commission reference database that there are no member operator facilities in the excavation area. The excavator must notify all non-member operators that are listed on the reference database as having underground facilities in the excavation area. In approving the rule implementing these changes, the Legislature extended the implementation date to May 2005.[6]

The 2005 Act allows the Commission to extend this provision to all excavators. In the proposed rule, we revised Sections 2(H-1) and 4(B)(1)(a)(ii) to remove the reference to excavations associated with drinking water well construction, thereby making these provisions applicable to all excavations. We noted that a significant number of excavators would benefit from the efficiencies gained by avoiding unnecessary delay in towns with no underground facilities. We received no comments on this amendment, and we have retained the proposed amendment in the provisionally adopted rule.

[4] Section 3, codified at 23 M.R.S.A. §3360-A (5-F).

[5] Sections 5(B)(8), 6(C)(3), and 6(C)(4) also are related to the drinking water well provisions of the law.

[6] Resolve 2003, ch. 127.

B. Newly installed underground facilities in active excavation areas

1. Content of the Proposed Rule

In the Notice of Rulemaking, we stated that while enforcing the damage prevention requirements, we have discovered a problem that can arise when a construction project involves installation of new underground facilities. The problem occurs most frequently when a project extends for many months, involves totally new facilities (as opposed to replacement of existing facilities) and involves multiple excavators. Current procedures require that the excavator (or excavators) pre-mark the site and notify the Dig Safe System and that operators mark the location of existing facilities within the pre-marked area. The problem occurs when new underground facilities are subsequently installed within the pre-marked area. The law does not require the facilities operator to mark those new facilities when installed nor to immediately notify the System of their location. Thus, subsequent excavators may not be aware that the newly installed facilities exist and risk hitting them during their excavation activity. None of the excavators or operators has violated the law. Rather, the law does not provide adequate safety procedures in this situation.

Section 1 of the 2005 Act requires the Commission to develop procedures to solve this problem through a rulemaking. In the Notice of Rulemaking, we set forth a potential solution and we summarized other suggestions made during the Inquiry. The components of the potential solution were: the excavator must request a new ticket from the System no less frequently than every 30 days; each excavator must obtain a ticket (rather than only the General Contractor); the operator must mark the location of newly installed facilities within one business day of the time that the facility becomes obscured by virtue of being covered with soil or other material unless the operator has reason to believe that no other underground facility will be installed in the excavation area; the operator must either provide the System with the location of *planned* facilities prior to installation, or within 15 calendar days of installing new underground facilities must notify the System of the location of the new facilities; and within 15 calendar days of receiving notification from an operator of a newly installed facility, the System must update its records to reflect those facilities.

In the proposed rule, these changes were in the form of amendments to Sections 4(B)(1)(a), 5(B)(10), 6(A)(1)(d)(iii), 6(B)(5), and 6(D)(3). We stated that these amendments accomplish two primary goals. First, they guarantee that new facilities are marked to alert excavators to their location. Second, they create some likelihood (which does not exist now) that excavators will be notified, when a new ticket is obtained, that facilities exist in the excavation area and that they should expect to observe and maintain marks. Ensuring that the excavator is first (through the ticketing process) notified that facilities exist in an excavation area and is then (through marking) notified of the precise location of those facilities is the major objective of the damage prevention procedures.

We also stated that the approach is not perfect because it leaves an exposure period during which an excavator may not be aware that a newly installed facility exists. This period begins when the facility is installed and ends when the excavator receives his or her first ticket after the System has updated its records. During that period, an excavator will not have been informed that the new facilities exist in the excavation area, and thus will have no reason to look for operators' marks. However, since the operator will be required to mark the new facilities, the excavator will see the marks if they have not been obliterated, and must maintain those marks or request a re-mark. Thus, the exposure is limited to situations in which an operator's marks have been removed without the excavator realizing that there is reason to expect marks to be there.

The proposed rule required excavators to obtain a new ticket every 30 days. This would give them an opportunity to learn that new facilities exist in the excavation area and would mirror what is already in place in New Hampshire. We stated that for this provision of the rule to be meaningful, the rule must contain a minimum timeframe within which records are updated.

The proposed rule required that each excavator, as opposed to a general contractor or other person who oversees multiple excavators, notify the System and obtain a ticket before beginning excavation. This would remove the risk that the person informed of the existence of underground facilities might fail to inform other excavators working in the vicinity of those facilities.

We stated that shortening the time in which an operator must notify the System of installation and the time in which the System must update its records, and increasing the frequency with which the excavator must obtain a new ticket – would reduce the exposure period.[7] On the other hand, the requirements should not be unrealistically burdensome, and during the Inquiry, operators and representatives of the System discussed the difficulty of meeting certain specific timeframes.

Finally, the proposed rule required that operators mark new facilities quickly (within one day). In our view, marking is an indispensable step in informing excavators of the existence of the new facilities.[8]

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[7] However, increasing the frequency with which the excavator must obtain a new ticket without requiring expeditious notification to the System by the operator of the location of new facilities and prompt updating of the System's maps would not result in a lessened exposure period.

[8] In the Notice of Rulemaking, we noted that, in some situations, a utility does not assume ownership of a new facility until a development project is complete. In these cases, the operator that is responsible for marking the new facilities may be the site developer.

As another alternative, in the Notice of Rulemaking we requested comments on the effectiveness of requiring operators to provide to the Dig Safe System the location of their *planned* new facilities before construction, and notify the System when those planned facilities have actually been installed. Under this option, there would be less need to further revise the existing procedures and less pressure on operators and the System to update the System records quickly after installation of new facilities. When excavators call the System for a ticket, the System would have a record of planned as well as existing facilities and would notify excavators of the identities of operators with facilities in the area, whether those facilities have been installed or not, so excavators would watch for marks. The System would call member operators to locate the facilities, and member operators would know from their own records whether the facilities had been installed yet and thus should be marked. A parallel requirement for non-member operators would be necessary, whereby non-member operators must be capable of notifying excavators that facilities are planned for a location.

In the Inquiry, we explored whether the procedures should be applicable to all excavation sites or confined to sites that display some definable characteristic (i.e., to an "active excavation area"). Many commenters stated that procedures should be simple and consistent across all situations, but nonetheless offered suggestions for exemptions, should the Commission decide to confine the procedures to specific situations.[9] Because we agreed that requirements should be simple and consistent so excavators and operators are certain of their obligations, the proposed rule established procedures for all excavations, with one exception: when the excavator has reason to know that the installation of an underground facility is the only excavation that will occur (such as with repair of a service line or other single-task project), the proposed rule does not require the operator to mark that facility after installing it. We stated that this situation poses no risk to safety or facility damage. In the interest of simplicity, however, the proposed rule did not, for this situation, remove the requirement that an excavator renew the ticket every 30 days. In addition, the proposed rule did not eliminate the requirements that result in the new facilities being recorded on the Dig Safe System records, because this procedure guards against future damage to that facility.

In developing the proposed rule, we considered both member operators and non-member operators. Appropriately, the requirement in the proposed rule to notify the Dig Safe System of newly installed facilities applies only to member operators. The proposed rule did not require either member or non-member operators to update their own records or to inform the on-site person who is locating facilities (the operator or its agent) of the location of newly installed facilities. We considered whether

[9] Suggestions of how we might limit the applicability of these procedures include excavations with continuous activity extending beyond 30 days, that involve multiple excavators, that are more than 2000 lineal feet, that require a general contractor or project engineer, that are not municipal or state projects, that are not for a single family home or small commercial building unless part of a larger project, and/or that are not new services to existing buildings.

the latter should be included since if the locater does not possess up-to-date records, the effectiveness of the procedure is significantly reduced. Based on our experience, we have some concern that records provided by the operator to the on-site locater are often significantly outdated or otherwise inadequate. However, we expect this situation to improve over time and will be observing whether that occurs.

2. Discussion and Decisions

a. 30-day Ticket Renewal

CMP supports adopting the requirement that excavators (which include CMP and other utilities that function as excavators and operators) obtain a new Dig Safe ticket every 30 days, stating that this requirement alone would substantially reduce the number of times a newly installed facility is damaged during excavation. AT&T, TAM, and Verizon also support this requirement. During the Inquiry, a number of entities that are both excavators and operators (e.g., Northern Utilities, Verizon, and the New England Cable and Telecommunications Association) made assertions similar to CMP's and, during informal conversations, excavators who were not operators did not express significant objection to obtaining a new ticket at regular intervals, which persuaded us to include the requirement in the proposed rule. During the public hearing held during this rulemaking, other excavators (who were also operators) did not object to this provision.

We adopt this requirement in the provisional rule. However, we disagree with the assertion that this requirement alone would reduce the number of times newly installed facilities are damaged. A ticket renewal results in location of the new facility only if the System's records indicate the existence of the new facility; thus, procedures to ensure that the System's records are updated to include the new facility must be put in place. The exposure period will continue to exist, but the exposure will be removed in some portions of the longer construction jobs.

A second measure was proposed by commenters in this rulemaking to reduce the exposure of newly installed facilities when the ticket is renewed every 30 days. This measure, a so-called "facilities buffer," is discussed in further detail later in this Order. In concept, the buffer is a zone around operators' facilities that is added to mapping data provided to the System when determining whether facilities exist in the construction site. This increases the notification zone such that, to the extent the System maps include the buffer and an operator has facilities within a buffer's-width of the excavation area, the System will notify the operator of the excavation. For example, if an operator has facilities in the street, and the construction site is within a buffer's-width of the street, the operator will be notified each time an excavator obtains or renews a ticket. If, new facilities exist in this area, the operator will have the opportunity to mark those facilities, even if the System's records have not yet been updated to reflect them. This measure would increase operator notifications incrementally, but the existence of new facilities in that area will be a random

occurrence. Thus, this measure does not ensure that an operator will be notified of excavations near new facilities.

A third factor was raised by commenters in the rulemaking. Many operators follow a procedure in which the System notifies them of any construction occurring in a town in which the operator owns underground facilities. In this situation, if an operator owns facilities anywhere in the town in which the excavation area is located, the System notifies the operator of the excavation. We do not anticipate that the procedure of defaulting to the town will continue long term; indeed, by Resolve last session,[10] the Legislature indicated its preference to end this practice because it results in a significant number of unnecessary locates. However, while it persists, 30-day ticket renewals will result in an opportunity that does not now exist to locate and mark newly installed facilities.

On Target commented that, if tickets are renewed every 30 days for large construction sites without refining the excavation area to match remaining excavation activity, the locator may be required to unnecessarily re-mark areas where further excavation may not be planned. In other cases, the locater may be required to remark locations where the prior marks are still evident. On Target suggests that unnecessary duplication could be avoided by requiring excavators, when renewing a ticket, to amend the location parameters to reflect completion of sections that were marked under a previous ticket. On Target's concern for unnecessary duplication or wasted marking effort is valid. However, excavators are already required to indicate the excavation location when they call the System. We encourage them to refine their description of the excavation area and to modify their pre-marked area, to more accurately indicate the excavation area as the work progresses, thereby reducing the frequency with which locaters remark in places where it is not necessary. These efforts will increase the efficiency of the process, benefiting everyone. Thus, we do not adopt a new requirement in the rule but we urge excavators to carry out this cost-saving measure as they renew tickets in a large construction site.

b. Each Excavator to Obtain Ticket

CMP commented that requiring each *person* who excavates to obtain a ticket from the System is unworkable, and suggests alternative language that would require each excavating company to obtain a ticket. We intended that the rule would require excavating companies to obtain tickets (not each person individually), and have revised Section 4(B)(1)(a) in the provisional rule accordingly.

c. Operator to Send Updated Records to the System

Many commenters discussed the requirement in the proposed rule that the operator provide to the System the location of newly installed facilities within 15 calendar days of covering the facilities with soil. The comments

[10] Resolve 2003 ch. 127.

generally addressed two topics: 1) the appropriate amount of time to require for operators to provide the System with record updates and 2) the entity that should be responsible for this task.

CMP commented that, under its current operational procedures, it would require a minimum of 21 business days to forward revised electronic maps to the System. TAM also argued for 21 business days whereas AT&T commented that it would need 15 business days. The Winthrop Utilities District noted that small utilities would find it difficult to meet the timeframe in the proposed rule, but did not propose an alternative. In the public hearing, Northern Utilities stated that 20 business days or 30 calendar days after the main was completed would be a reasonable timeframe. Verizon commented that 30 calendar days would be a workable timeframe. Most operators' timeframe proposals were contingent on the assumption that the timeframe should begin when the entire facility has been installed. Some operators commented that, while the update process is done through routine operational procedures whose timeframe generally can be predicted, unusual circumstances sometimes occur and cause the timeframe to lengthen.

In addition, many operators that are also utilities (CMP, Winthrop Utilities District, and PWD) commented that they generally do not take ownership of a new facility until it is completely installed, and perhaps until the construction project is complete. Until that time, the owner of the building or the developer owns the facility. These operators argue that they cannot update their records until they assume ownership of the facility. Furthermore, CMP commented that, in some instances, it does not own a customer's private underground secondary line, even after construction is completed; thus, it should have no responsibility for sending record of such lines to the System. NU commented that, although it owns and constructs all facilities to the customer's premises, it would be unreasonable to send updated records to the System until the line is fully installed and filled with gas,

In our view, it is critically important that the records of both operators and the Dig Safe System be as up-to-date as possible, as soon as possible. We believe that a requirement to update records "as soon as practicable" is essentially meaningless. Thus, in the provisional rule we include a specific timeframe within which operators must provide updated mapping records to the System. We have lengthened that timeframe to 21 business days (from the 15 calendar days in the proposed rule). This timeframe appears to be adequate under normal circumstances, for most operators that commented. We decline to include a contingency for unusual circumstances as the waiver provision of the Rule could be used to accommodate such a situation.

As stated in our proposed rule, we are aware that a utility may not assume ownership of a newly installed underground facility until the facility is completely installed. The statute and the rule clearly define "operator" as the "owner or operator of an underground facility." Under this definition, it is clear that the utility is not the "operator" until the utility assumes ownership or operation of the facility (it is our understanding that the utility would not begin to operate the facility until it assumed

ownership) and indeed may not ultimately become the operator. The proposed rule adequately addressed utilities' concerns that the timeframe for updating records should begin when the utility assumes ownership because until then the utility is not the "operator" and thus not subject to the rule's updating requirements. For the same reason, the proposed rule addressed CMP's concern that it should not be required to provide updated records of facilities it does not own. Thus, we did not change the provisional rule in response to these concerns.

We note that the private developers or site owners who own the facilities while they are being installed are not members of the System and thus will not be required to send updated records to the System. This fact results in a longer exposure period during which some or all portions of a facility are covered with soil but no System record exists. While we seek to make that exposure period as short as possible, we recognize that there is no workable way to require the non-member private owners to send records to the System and have not attempted to do so through this rulemaking. However, we encourage utilities to review their procedures to determine the earliest occasion on which they can provide the System with adequate location data for new facilities for which they are in the process of assuming ownership and placing in-service so that this exposure period will be minimized.[11]

d. Operator to Mark Facility Location within One Day of Installation

When commenting on this provision of the proposed rule, utility operators reiterated their concerns that they generally do not own the facility while it is being installed underground, and thus they would find it burdensome to mark the facility within one day of the time it is covered with soil. As we stated earlier, the rule would not require the utility to mark the facility until it assumed ownership. Thus, the proposed rule addressed this concern adequately and we made no changes in the provisional rule. We note that the provisional rule requires that the private developer or owner must arrange for the excavator (or any entity that it concludes is best suited) to carry out this marking provision. We expect that this provision may solve some portion of the problems encountered in locating new facilities during construction, because excavators will simply see the marks, regardless of whether the System has told them to expect facilities in the area.

e. Dig Safe System to Update its Records

The System commented that, under normal operating circumstances, it updates its records within 15 business days if the operator submits digital records and within 21 business days if the operator submits paper maps. Processing paper maps takes longer because the System must ship maps to and from

[11] For instance, the utility could make arrangements with the developer, for the period prior to taking ownership of the new facilities, to provide maps of, and to mark out, the new facilities, as circumstances dictate.

the operator and its own mapping vendor and because System personnel must transfer the operator's information to digital format. In addition, the System commented that unusual circumstances may result in additional processing time. The System recommended the following requirement: "within 15 business days or as soon as practicable after receiving digital data or updated paper maps from an operator of a newly installed facility, the system must update its records to reflect those facilities."

As noted earlier, it is critically important that the records of both operators and the Dig Safe System be as up-to-date as possible, as soon as possible, and, in our view, a requirement to update records "as soon as practicable" is essentially meaningless. We decline to include this contingency because we anticipate that the System will make all reasonable efforts to serve its members in a timely way. Consistent with requirements for operators to provide updated records to the System, the provisional rule includes a specific timeframe within which the System must update is mapping records. We have lengthened that timeframe to 21 business days (from the 15 calendar days in the proposed rule) because that timeframe is adequate under normal business circumstances for the System to update both digital and paper maps and because it is consistent with the timeframe provided to operators.

f. Operators to Optionally Submit Pre-construction Plans to the System

The Winthrop Utilities District and AT&T commented that providing pre-construction plans to the System is not a workable approach because the planned facility locations are often modified during construction.

In the provisional rule, we have retained the option to submit pre-construction plans to the System on a voluntary basis. If operators do not have pre-construction plans or believe those plans will be significantly unreliable, they need not submit them. However, similar to our discussion of the situation in which ownership moves from a developer to a utility, if and when an operator submits pre-construction plans, excavators will benefit from more timely System records and consequent locations.

We recognize that revising the locations during construction would render the detailed System records inaccurate. However, the fact that the System would detect that an operator had any facilities at all in the construction area would be beneficial because it would result in the System notifying the operator to perform a location. The operator would presumably locate the actual, not the planned facilities. We also recognize that this situation is complicated by the fact that the "operator" during construction is the developer or site owner and not the ultimate utility owner. However, because this provision is optional, utility operators may use it when it is useful but not when it will result in locating requirements that cannot reasonably be fulfilled.

g. Use of a Facility's Location Buffer to Increase the Chances that Operators will be Notified

Some operators suggested that we require that excavators renew their tickets every 30 days and allow operators to expand the "footprint" of their facilities by adding a "buffer" to the facility locations on the maps supplied to, and used by, the System. Suggestions for the size of the buffer ranged from 500 feet to 1000 feet. The premise of this approach is that, the larger the facility area is, the greater the chances are that operators with newly installed, but unrecorded, facilities will be notified of excavations.

These operators argued that expanding the facility footprint would increase the likelihood that the System records would indicate that a facility exists within the excavation area, because this enlarged facility area might include existing (but not new) facilities. They further maintain that, given the expanded potential for capturing an existing facility when the excavator calls for a ticket following an operator's installation of new facilities, the System would be more likely to notify the operator than it is now, and the operator would be likely to mark the newly installed facility because it would be aware that the new facility existed.

This suggestion depends on the possibility that a newly installed facility might exist within the expanded identification zone of an existing facility, a relatively random circumstance. The solution has only a tenuous connection to the objective of identifying facilities that do not exist at the time the System is notified of an excavation, leading us to believe that it is not likely to be particularly effective in solving the problem.

Finally, expanding the buffer to include an excessively large area conflicts with the efficiency modifications approved by the Legislature (with the System's concurrence) in 2004; the increased facility footprint would result in more unnecessary System call-outs (i.e., calls for the operator to locate, when in fact there are no facilities in the excavation area) than does the current mapping requirement, which adds a System mapping tolerance of 133 feet to the facility location provided by the operator. Unnecessary call-outs are an expense for the operator, and they unnecessarily delay the excavator. It was just this concern that prompted well drillers to seek and obtain legislation that resulted in changes to the law to avoid these unnecessary delays.[12] We are concerned that if excavators encounter unnecessary delays, they will avoid calling the System altogether, certainly a result we seek to avoid.

[12] For example, in many instances, the System's records show only that an underground facility exists somewhere in the town where the excavation occurs. This causes a significant number of unnecessary call-outs and unnecessary excavation delays. We have been told that for some operators 70-90% of the notifications are "false" due to this broad brush method of matching excavation and facilities' locations.

We also wish to avoid unnecessarily delaying productive work at excavation and construction sites, as well as inefficient operation of the one-call procedure.

For these reasons, we did not include this suggestion in the provisional rule.[13]

C. Penalties

1. Content of the Proposed Rule

The damage prevention law provides that the Commission may impose an administrative penalty of up to $500 for violating certain provisions of the statute, and increases the maximum penalty to $5,000 for a subsequent violation occurring within 12 months of a previous finding of violation. 23 M.R.S.A. §3660-A (6-C). As a general practice, when the Commission determines that an excavator or operator has violated a provision of Chapter 895, it orders the entity to initially attend a training session offered by the Commission or, for successive violations, imposes a monetary penalty. The Commission has generally imposed a uniform $500 penalty (even when allowed to impose a penalty up to $5,000) to ensure that all entities are being treated consistently during the early period of damage prevention enforcement.

In our Notice of Rulemaking, we stated that the overall goal of the damage prevention procedures is to safeguard people and property. Thus, the goal of the penalty structure should be to induce behavior that reduces the incidence of personal injury, service interruption, and property damage. We further stated that we had examined laws and criteria used in other states for determining penalty levels imposed for violations of damage prevention rules, and we summarized our findings. We also summarized current penalty provisions of other statutes we enforce.

In the proposed rule, we included seven criteria, listed and discussed below, to be used flexibly by the Commission when determining penalty levels for violation of the damage prevention rules:

- history of prior violations (i.e., violator's damage prevention record);

[13] The proponents of the facility buffer concept also argue that such a buffer is necessary for other reasons relating to the manner in which the System processes excavation calls, the accuracy of the System's current base maps, and the mapping specifications contained in Section 6(A)(1)(d) of the existing rule. Because we proposed no change to Section 6(A)(1)(d) in this Rulemaking, we have engaged in discussions with these operators outside this docket with the goal of collaboratively identifying workable resolutions of each operators' concerns and particular circumstances. We also reinstated a waiver of the mapping requirements of Section 6(A)(1)(d) until April 1, 2007. See *Public Utilities Commission Underground Facility Damage Prevention Requirements (Chapter 895),* Order Reinstating Waiver, Docket No. 2003-672 (Feb. 10, 2006).

- degree of or threat to personal injury or public inconvenience caused by the violation or death caused by the violation;
- amount of property damage caused by the violation;
- degree of compliance with other damage prevention requirements;
- good faith efforts to comply;
- steps to ensure future compliance; and
- amount necessary to deter future violation.

In addition, we invited comment on whether a very specific fine schedule would be preferable to these general criteria.

a. Record of Prior Violations

Consideration of prior violations is a common criterion used when establishing penalty levels. This criterion generally results in greater penalties as the number of violations increases. It allows leniency for violations that occur while an excavator or operator is becoming familiar with the law's requirements, while strengthening sanctions against repeat offenders.

Maine damage prevention law adds an aspect to this general criterion that is somewhat different from the commonly-used escalating penalty scale, when it specifies that "(b)efore imposing any penalties under this subsection, the commission shall consider evidence of the record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months." 23 MRSA §3360-A (6-C). In the Notice of Inquiry, we noted that this provision poses two practical problems.

First, the Commission has no reasonable way to ascertain the number of successful excavations made by a private company. Asking each Maine excavator to report its number of excavations annually would be burdensome, and verification would be impossible. The number of tickets obtained from the System does not provide the answer because excavation may not occur within the required 30 days or multiple tickets may be obtained for ongoing projects, which would inflate this statistic.

Second, the Commission has no way to quantify the number of successful locates that operators perform. While we can obtain the number of notifications that an operator receives from the Dig Safe System, and thus the number of locates performed without a violation incident, this number is not equivalent to the number of successful locates. This is true because an inaccurate locate does not necessarily result in an excavator damaging the underground facility. To count that instance as a "successful location" artificially inflates the results. Finally, the statute does not make clear how this requirement should be used to determine a penalty. In particular, it is unclear how an entity that regularly and successfully engages in underground facility activity (and thus might be expected to be well-practiced as well as

knowledgeable about the damage prevention requirements) should be compared with one that infrequently engages in underground facility activity.

With these difficulties in mind, the proposed rule specified that, when determining a penalty level, we would consider the violator's record of *violations* during the past 12 months. The result would be penalty levels that escalate as an entity commits successive violations. This approach inherently rewards entities that carry out successful locates or excavations. We stated that this criterion would adequately accomplish the overall goals of the law and would make clear how we intended to include a consideration of prior successes in our enforcement actions, given that we had found no more workable way to implement the law's requirement.

b. Death, Personal Injury, or Inconvenience

This criterion would cause us to evaluate the risk that the violation poses to public safety. Because personal safety is the most important goal of the damage prevention procedures, we view the threat of personal injury to be as serious as the causing of such injury, and the proposed rule did not differentiate between a violation that could have killed or injured a person and a violation that actually did so. In the Notice of Rulemaking, we commented that threats of personal injury would include situations that place a large number of people in danger, that could kill or seriously injure a person, or that disrupt E-911 service. We stated that examples of public inconvenience are service disruptions that prohibit a company from doing business, that require citizens to obtain water from alternate sources, or that disrupt municipal administrative activities. These violations should result in a higher penalty than violations that harm only procedures or equipment. This criterion responds to the 2005 Act's requirement that the Commission consider the violation's "impact on those served by the underground facility." P.L. 2005, ch. 334, section 5.

c. Amount of Property Damage Caused

This criterion would allow imposition of a higher penalty when the violation causes actual damage to a facility, as measured in terms of monetary impact. The presence of property damage is often accompanied by a service outage and the cost of repair creates an unnecessary economic impact on ratepayers.

d. Degree of Compliance with other Damage Prevention Requirements

In the Notice of Rulemaking, we stated that this criterion allows strong sanctions against an entity that continually ignores damage prevention procedures. Such behavior signals the likelihood of future violations. This criterion would include instances when an excavator or operator routinely fails to pay penalties,

fails to respond to Commission requests for information, fails to update its records in a timely manner, or is routinely cited for other violations.

e. Good Faith Efforts to Comply

In the Notice of Rulemaking, we stated that the goal of this criterion is to allow leniency when an operator or excavator clearly attempts to follow damage prevention requirements and reasonable construction practices, but encounters a situation over which it has little control. Allowing a lesser penalty for good faith effort will induce entities to report all problems, and will encourage reasonable practices generally. The determination of good faith effort requires an evaluation of the excavator's actions. To judge whether an entity followed reasonable practices, we would consider the recommendations of the "Common Ground, Study of One-Call Systems and Damage Prevention Best Practices," published in August 1999, which describes practices that are considered reasonable by stakeholders representing all facets of industry groups and government agencies engaged in underground facility damage prevention.[14] In addition, we would look for indications of whether the violator evidenced knowledge of, and adherence to, damage prevention practices, such as typical underground facility configuration and location technique. For example, if the locating entity did not sweep the excavation area, or did not observe the existence of above-ground facilities such as padmount transformers that clearly suggest the presence of underground facilities, we might conclude that reasonable practices were not employed.

f. Steps to Ensure Future Compliance

This criterion induces operators and excavators to improve their practices and avoid future dangerous situations. It allows leniency for an inexperienced entity that demonstrates an effort to improve in the future, and it allows strong sanctions against an entity that demonstrates the likelihood of being a repeat offender through indifference to damage prevention requirements.

g. Amount Necessary to Deter Future Violation

Because of the wide disparity among entities engaged in excavation – from one-person excavators and homeowners to multi-million dollar, national companies – it is difficult to develop a single penalty structure that is effective and fair for all. For example, a $500 penalty could be onerous for a small company, but could be so small as to constitute a minor cost of doing business for the largest of Maine's companies. In our Notice of Rulemaking, we stated that this criterion allows flexibility to impose stronger sanctions if it becomes clear that repeated, smaller

[14] "Common Ground" sponsored by the United State Department of Transportation, Research and Special Programs Administration, and Office of Pipeline Safety, in accordance with the Transportation Equity Act for the 21st Century (TEA 21). It may be viewed at the Commission's library at 242 State Street, Augusta.

penalties are not deterring an entity from violating damage prevention procedures, and lesser sanctions when the ability to pay makes a penalty more onerous. In addition, this criterion allows more lenient treatment of a homeowner who is not knowledgeable in damage prevention procedures but who is unlikely to have excavation occur near his or her facilities in the foreseeable future.

2. Discussion and Decision

a. Update of Section 8(C)(3)

While not related to our proposed amendments, CMP commented that Section 8(C)(3) describes violations for which we do not have authority to impose penalties under current law and so they should be removed from this provision of the rule. Section 8(C)(3) lists four operator violations, including an operator's failure to comply with the requirements of 6(B)(1), 6(B)(2)(a), 6(B)(2)(b), and 6(B)(4)(b) of the rule. These provisions, in order, encompass the following operator requirements: 1) to mark its facilities when notified of an excavation, 2) to mark within 2 days of receiving notification, 3) to remark within 24 hours of receiving a request to remark, and 4) to mark within the tolerances indicated in the law.

CMP is correct with respect to two of the four rule sections listed. In 2004, at CMP's request, we reviewed the language that underlies these rule provisions in the law, 23 M.R.S.A. 3360-A (4). Using the rules of statutory interpretation as established in Maine law, we held that our authority to impose penalties under Subsection 4 extended only to the requirement that operators mark within the time limits of the law. See *Central Maine Power Company, Request for Adjudicatory Proceeding Regarding Dig Safe Recommended Decisions,* Order (May 3, 2004). Accordingly, we remove references to Sections 6(B)(1) and 6(B)(4) from our rule, leaving only references to those sections that set out the time limits for operator marking contained in the law.[15]

b. Flexibility

On Target commented that, in the field, there are occasions when underground facilities cannot be detected and are thus damaged, despite good faith efforts to prevent this. On Target is concerned that if penalties are capriciously assessed, they would not serve to punish violators in a rational manner and would be counter-productive. On Target therefore recommends that larger penalties be reserved for occasions when an entity's actions are willful or egregious. TAM commented that using criteria to determine varying penalty levels for different violations is preferable to the current practice of imposing a uniform $500 fine for every violation.

[15] We have not imposed penalties on operators under the sections that we now strike from the rule since our Order interpreting this provision of the law was issued.

On Target also commented that it is not necessary to impose a large penalty to induce a company to comply with regulatory requirements; that construction companies find it important to its clients that the company have a good compliance record. PWD commented that penalties of $500 to $5,000 result in many violations going unreported, apparently believing that these penalty levels are onerous to many operators and excavators.

We agree with On Target's concern that the penalty structure and criteria should result in higher penalties for willful or egregious actions and that the Commission should retain adequate flexibility to judge each case based on the situations encountered in the field. In our view, when taken in their entirety, the seven criteria do just that, allowing a sufficient level of flexibility to accommodate the wide variety of circumstances and entities that we encounter during enforcement of the damage prevention laws. As a regulatory agency responsible to the public and to the entities we regulate, we do not intend to impose "capricious and counter-productive" penalties. Indeed, implementing criteria that are rigid enough to avoid On Target's concerns would remove the very flexibility that On Target and others believe will result in fair treatment in all situations.

c. Consideration of Prior Successes when Imposing Penalties

TAM and On Target commented that the proposed rule did not comply with the statutory requirement that the Commission consider prior successes when imposing a penalty. While TAM stated that the situation is complex, it did not consider the first criterion in the proposed rule to adequately address, on its face, the statutory requirements. TAM supports using the number of tickets compared with the number of violations to measure the number of successful locates, commenting that if a ticket is taken out and there are no reports of damage to individual or facilities and no service interruptions, then it is reasonable to presume that the locates and excavations were done successfully. On Target also supports using the number of tickets compared with the number of violations to measure the number of successful locates. It argues that the Commission's concern that the number of inaccurate locates that do not result in a damage artificially inflates the number of successful locates is misleading because it believes that the percentage of inaccurate locates is likely to be small, perhaps only 1% of all locates. On Target suggests that the Commission should support its concern with data to better evaluate its magnitude. PWD supports using measurable performance outcomes that acknowledge that an operator performing many locates with few violations is a better performer than one that performs few locates with the same number of violations, but does not discuss how the Commission should determine the number of successful locates.

Despite the comments of TAM and On Target, we continue to believe that the number of tickets compared with the number of violations is a misleading and inaccurate measure of the number of successful locates largely because of the numbers of tickets issued where there are no facilities in the excavation area. It does not meet the intent of the statute to count tickets as successful facility

locates when the operator does not perform a locate there at all. We also continue to believe that, even if we had an accurate measure of successful locates, it would be difficult to use this measure in an equitable manner. For example, we remain uncertain how an entity that regularly engages in underground facility activity and may thus be expected to be familiar and skilled in the procedures should be compared with an entity that performs less activity.

Nevertheless, because the damage prevention law requires that the Commission consider (when applicable) prior successes before imposing a penalty, in the provisionally adopted rule we have included the requirement as one of the criteria that we will consider when determining an administrative penalty. To do so, we have modified Subsection 8(D)(2)(a), which in the proposed rule stated that we would consider the violator's record when determining the penalty, to also include the statutory language containing the requirement to consider the violator's history of prior successes, to the extent applicable.

When we carry out enforcement procedures, we will require an excavator or operator to present to us evidence of the number of successful excavations or locates it has performed in the 12 months prior to the violation. We are skeptical that any entity will be able to do so with enough factual certainty to convince us to use the information when determining a penalty. In particular, absent more compelling arguments than we have received so far, we are unlikely to accept the number of prior tickets as a measure or successful locations or excavations. However, experience over time will reveal whether our skepticism is warranted.

We anticipate that, when the Legislature considers adoption of this major substantive rule, we will present to them our belief that, in most cases (perhaps all) we will be unable to use the number of past successes to determine a penalty level. We will, however, present to the Legislature the option to include in the provisionally adopted rule language that explicitly adopts the method of using number of tickets as a measure of successful locates or excavations. If the Legislature explicitly requires that we use this method through its revision of the rule, then we will do so.

TAM also suggested that the practice of sending Notices of Probable Violations should be revised as it believes that the current practice requires the cited company to prove that it did not commit the cited violation.[16] TAM suggested holding an initial hearing on the merits, to establish the facts the Commission would use when weighing the criteria that would determine the level of an administrative penalty. In addition, TAM suggested that companies with at least 500 locates or excavations in

[16] We do not agree with TAM's characterization of the current process which offers the Respondent the option of consenting to the violation cited in the NOPV or of requesting an informal conference designed to explore the facts of the situation in more detail. The latter appears to be what TAM is proposing be done and, in fact, it may select that option under the current process.

the past 12 months and a record of 99% or greater successful projects (presumably indicated by number of tickets) would be penalized only if negligence were found.[17] We had requested interested persons to present us with suggestions for implementing this provision, and we appreciate the fact that TAM did so. We are not persuaded that TAM's suggestions solve the difficulty of judging successful locates and excavations. For instance, currently the only operator violation that is specifically set out in the law (other than marking that is done in a negligent or reckless manner) is failure to mark within the time period proscribed by statute. We see it as contrary to the intent of the statute to waive the administrative penalty for the one specific violation identified in the law, particularly as doing so would remove operators' incentive to mark in a timely manner. However, as we process future probable violations using the newly established criteria, we will consider whether a change to the procedures would improve their effectiveness, and we urge TAM and other parties to do the same.

In the provisionally adopted rule, we also renumber the sections for internal consistency and revise subsection 8(D)(2)(b) to improve its clarity.

D. Discovered Facilities

During the legislative discussion of the 2005 Act, concern was expressed that an operator may own an old facility that does not appear on the operator's records. To ensure that the damage prevention procedures result in continual improvement in safety and damage avoidance, the 2005 Act requires that, when an underground facility is discovered during an excavation and the location of that facility was, prior to the discovery, unknown or unclear to the operator, the Commission may direct that operator to "determine and map the location of the facility for a reasonable distance, as determined by the commission, from the point of discovery." 23 M.R.S.A. §3360-A(14).

In the Notice of Rulemaking, we expressed the view that, whenever possible, the operator should locate and map as much of the discovered facility as is reasonably possible for optimal safety benefits. With this in mind, Section 6(B)(6) of the proposed rule required the operator to locate the discovered facility to the point it connects to a known facility or to the point that it ends. The proposed rule provided that, if it is not reasonably possible to locate the facility to either of these points, the operator may provide an explanation to the Commission of why location is not possible and the Commission may waive this requirement. This would allow the operator to comply with the provision of the rule without Commission intervention in most instances, but avoids overly onerous situations.

We also stated that Subsections 4(C)(4) and 4(D)(1) currently require that an excavator who discovers an unmarked facility during excavation must contact the operator, and the operator must visit the site to determine whether the facility is active,

[17] The majority of operator violations, -- such as inaccurate marking, operator failure to provide the locater with adequate maps to support an accurate mark out, or failure to employ good location practices -- fall under the category of negligence.

before the excavator may continue with excavation at that location, and that this visit by the operator may afford an opportunity to determine the wider location of the discovered facility, without requiring additional visits to the site.

No commenters disagreed with the basic process contained in this provision of the proposed rule. However, commenters echoed the concerns, discussed above, that the proposed rule's timeframe for providing updated maps to the System was unworkable and generally suggested timeframes consistent with those required for notification of facilities newly installed in an excavation site.

It is reasonable to establish consistent timeframes in all sections of the rule that address operators' requirements to update mapping records. The operators' procedures are similar under both circumstances, and internal consistency makes compliance simpler for operators. Thus, in the provisionally adopted rule, Section 6(A)(1)(d)(iii) requires that member operators notify the System of a discovered facility within 21 business days and Section 5(B)(10) requires that the System update its records within 21 business days of receiving this notification.

Accordingly we

O R D E R

1. That the attached rule, Chapter 895 – Underground Facility Damage Prevention Requirements, is hereby provisionally adopted;

2. That the Administrative Director shall file the provisionally adopted rule and related materials with the Secretary of State; and

3. That the Administrative Director shall send copies of this Order Provisionally Adopting Amendments and the attached provisionally adopted rule to:

The Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0015 (20 copies).

4. That the Administrative Director shall notify the following of this Order:

   a. All persons who have commented in this rulemaking; and

   b. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking.

Dated at Augusta, Maine, this 22nd day of February, 2006.

BY ORDER OF THE COMMISSION

_____

Dennis L. Keschl
Acting Administrative Director

COMMISSIONERS VOTING FOR: Adams
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.